C.I. HOLDINGS BHD.

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABU MANSOR BIN ALI J.
[ORIGINATING MOTION NO. R1-25-11 OF 1992]
10 DECEMBER 1993

INDUSTRIAL LAW: Industrial Court hearing dispute relating to termination of claimant's services - Company making preliminary objection - Company claiming claimant not a "workman" but a director - Industrial Court dismissing objection - Company applying for orders of certiorari and prohibition.

The second respondent filed an action in the Industrial Court contending that his dismissal from the services of the applicant was without just cause or excuse. The applicant raised a preliminary objection on the grounds that the second respondent was a director of the subsidiaries of the applicant and as such was not a "workman" within the meaning of the Industrial Relations Act 1967 (the Act). The applicant therefore argued that the Industrial Court had no jurisdiction to deal with the matter.

The second respondent did not deny that he was a director of the subsidiaries but maintained that he was not the "mind and will" of the companies he was a director to as he had to report to the Managing Director of the company.

The Industrial Court dismissed the applicant's objection and the applicant applied to the High Court for an order of *certiorari* and prohibition to restrain the Industrial Court from proceeding to hear the matter. The question that arose was whether the learned Chairman of the Industrial Court had erred in law which affected jurisdiction.

Held:

On the facts of the case, the learned Chairman had erred in not asking the correct question and ought to have ruled that the applicant was not a "workman" under the Act. In the circumstances the Industrial Court had acted in excess of jurisdiction and therefore the ruling was a nullity.

[Application for order of prohibition allowed with costs].

Awards referred to:
C. I. Holdings Bhd. v. Hong Kian Ngan 417 2ILR [1988] (Award No. 273/88)

Cases referred to:
Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor. [1985] 2 CLJ 16, 305/[1985] 2 MLJ 297 ***(foll)***

Legislation referred to:
Companies Act 1965
Evidence Act 1950 s. 114(g)
Industrial Relations Act 1967, ss. 2, 20(2)

For the applicant - N. Sivabalah; M/s. Shearn Delamore & Co.
For the respondent - Vincent Chandran; M/s. Shahriza, Varegheese and Chandran

JUDGMENT

Haji Abu Mansor Bin Ali J:

Pursuant to leave being granted the applicant applied by notice of motion in enclosure (8) applying for an order of prohibition directed to the Industrial Court prohibiting it from further continuing to hear Industrial Court Case No. 3/4-347/87 and other ancillary orders.

At the commencement of the hearing before the learned Chairman of the Industrial Court the applicant, upon due notice, raised a preliminary objection as follows:

> The claimant being a director is not a "workman" within the meaning of the Industrial Relations Act 1967 and accordingly this Honourable Court has no jurisdiction to deal with the matter herein

The learned Chairman after hearing arguments dismissed the preliminary objection in the form of Award No. 273/88 on 20 October 1988. The learned Chairman held that the 2nd respondent was in law a "workman" within the meaning of the said Industrial Relations Act and ordered the reference to be heard. Hence the application by way of *certiorari* seeking an order of prohibition in the said reference case.

Just as before the learned Chairman the same issue is canvassed before me and the application raises one issue of whether the claimant, being a director, is a "workman" within the meaning of Industrial Relations Act 1967 and accordingly the Industrial Court has no jurisdiction to deal with the matter herein.

This time however the Court is aware that this is not an appeal but a *certiorari* and an application for an order of prohibition. This Court will only interfere if it can be shown that the learned Chairman had erred in law which affected jurisdiction. The powers of this Court interfering had been settled by previous decisions of the Supreme Court.

This Court will not lightly disturb the Industrial Court's finding unless there are solid grounds for so doing or unless the learned Chairman had asked the wrong question.

From the documents and letters exhibited and the finding of the learned Chairman it is clear that Mr. Hoh was employed by the said company as "general manager" with specific duties as director/general manager - as per exhibit "FH-B" in "VT-2" and that his senior officer is the managing director of the company. Subsequently he also became the director/group general manager of the other subsidiaries.

The 2nd respondent on the other hand testified in the Industrial Court during the hearing of the preliminary objection that he was not a director of the company in the true sense of the word. He was subsequently made a director merely to comply with the Companies Act. According to the grounds of judgment of the learned Chairman of the Industrial Court; Mr. Hoh testified that he did not have any shares in the company, that he could not work independently without referring to the managing director on matters about his wants and he was not "the mind and will" of the companies that he was a director to.

According to *Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor.* [1985] 2 MLJ 297 Salleh Abas L.P. at page 300 said:

> There can be no doubt that the relationship between the appellant and the respondent by virtue of the contract of employment dated 25 June 1977 was that they

were master and servant, or employer and employee. But this fact is neither here nor there, because the **important criterion is the capacity or purpose for which the respondent was employed.**

In that case, the respondent Mr. R.B. Gray was employed as a director. It is clearly stated in the contract of employment that he is to be employed as a director and therefore the parties to the contract must have intended that the respondent was not to be regarded as a workman.

However, in the present case, in what capacity is the 2nd respondent Mr. Hoh employed as? In his letter of offer dated 7 November 1983, it was stated that he was employed as "general manager with specific duties as director/general manager of Dorf (M'sia) Sdn. Bhd." It can be seen from here that **his post is as general manager** of the company with "specific duties as director/general manager of Dorf (M'sia) Sdn. Bhd." The facts disclosed that he was subsequently promoted as group general manager and his duties were enlarged to oversee the subsidiaries.

The respondent on the other hand, never denied that he was a director of the subsidiaries but he maintained that he was not the "mind and will" of the companies he was a director to. He had to report to the managing director of the company.

It should be noted that at this stage of the hearing of the preliminary objection, the Industrial Court made an observation, that is, that the respondent was not shaken at all during his cross-examination.

Moreover, there are other evidence to support the contention that the respondent's post is that only of a general manager and subsequently as group general manager, that is:

(i) in a letter dated 16 January 1987 sent by the said company, to the respondent i.e. notice of domestic inquiry, it was alleged that the respondent "... being the group general manager in charge of ..."

(ii) in a letter dated 10 February 1987 sent by the said company to the respondent whereby it recommended to the management to take the appropriate disciplinary action against the respondent, it was stated that "... we are of the opinion that as general manager and subsequently as group general manager charged ..." and lastly,

(iii) according to the notes of proceedings on the Board of Domestic Inquiry, i.e. exhibit "HKN-2" in the affidavit of Hoh Kiang Ngan dated 17 July 1993, it was noted that amongst those present for the inquiry was one " Mr. Frank Hoh, group general manager being employee charged".

Based on the above the Industrial Court came to a finding of fact that the respondent was not the mind and brain of the subsidiaries. He took orders from the managing director of the company i.e. a Mr. Ng Sing Hwa. The Industrial Court further invoked s. 114(g) of the Evidence Act 1950 presumption as Mr. Ng was not called to challenge the respondents' evidence.

The 2nd respondent, on the other hand, sent a letter dated 17 February 1987 to the Industrial Relations Department, seeking their assistance to conciliate pursuant to s. 20 (2) Industrial Relations Act 1967. In it, he said that he was employed by C.I. Holdings Bhd. as group general manager and he also enclosed a copy of his appointment letter.

In the same *Inchcape Malaysia Holdings Bhd. (supra)* at p. 317 Seah SCJ says:

> The question is whether a company director includes a "workman" within the meaning of s. 2 of the Industrial Relations Act 1967 (as amended). I have already said that the Act postulates that there should be an employer on the one side and workman on the otherside. A company director has been said to represent the directing mind and will of the company, the very ego and centre of the personality of the company.

A little later in the same judgment George Seah SCJ held at p. 318:

> In short, the simple test appears to be this: If a person or a company director can be regarded either expressly or by necessary implication, as representing the company in the course of the trading activities of the company, he ought not to be treated as a workman under the Act. Some support for this proposition may be found in *Bolton Engineering* case *(supra)* at p. 630 where Denning LJ said:
>
> > Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these directors and managers is the state of mind of the company and is treated by the law as such.

On the facts of this case I am of the view the learned Chairman had erred in not asking the correct question and ought to have ruled that the applicant was not a "workman" under the Act and in my opinion the Industrial Court had acted in excess of jurisdiction and therefore the ruling was a nullity. That being the case, I allow the application for an order of prohibition as prayed with costs.